No. [redacted] 79

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, PETITIONER

v.

THE F. & M. SCHAEFER BREWING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General,
JOHN N. STULL,
Acting Assistant Attorney General,
HILBERT P. ZARKY,
KARL SCHMEIDLER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

415929—57——1

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The memorandum decision of the District Court (Appendix A, *infra*, pp. 16–18) is not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 20–29) is reported at 236 F. 2d 889.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1956. (Appendix A, *infra*, pp. 29–30.) On November 30, 1956, the time within which to file a petition for a writ of certiorari was

extended, by an order of Mr. Justice Harlan, to February 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, under the Federal Rules of Civil Procedure, the appeal time ran from the date of the District Court's memorandum decision, and of a docket entry stating that taxpayer's motion for summary judgment had been granted, or from the later date on which the formal judgment was signed and a docket entry made stating "Judgment filed and docketed" and giving the amount of the judgment.

RULES INVOLVED

Federal Rules of Civil Procedure:

> Rule 54. JUDGMENTS; COSTS.
>
> (a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.
>
> * * * * *
>
> Rule 58 [As amended December 27, 1946]. ENTRY OF JUDGMENT.
>
> Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only

money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73 [As amended December 27, 1946, and December 29, 1948]. APPEAL TO A COURT OF APPEALS.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

A party may appeal from a judgment by filing with the district court a notice of appeal. * * *

* * * * *

Rule 79 [As amended December 27, 1946, and December 29, 1948]. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) *Civil Docket.* The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

* * * * *

STATEMENT

The facts as found by the Court of Appeals (Appendix A, *infra*, pp. 21–22) may be summarized as follows:

In a refund suit, taxpayer alleged payment of documentary stamp taxes in the amount of $7,189.57 which it claimed was illegally assessed and collected, and demanded "judgment against defendant in the sum of $7,189.57, interest and costs." (Appendix A, *infra*, p. 21.) Upon joinder of issue, taxpayer moved for summary judgment. (Appendix A, *infra*, p. 22.) On April 14, 1955, the district judge issued a memorandum decision which concluded by stating "the plaintiff's motion is granted." (Appendix A, *infra*, p. 18.) On the same day the clerk made the following docket entry (Appendix A, *infra*, p. 15):

> April 14 Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.

On May 24, 1955, a formal judgment was signed by the district judge which set forth the amounts recovered by the taxpayer together with interest and costs. (Appendix A, *infra*, p. 19.) On that day the clerk made the following entry in his docket (Appendix A, *infra*, pp. 15–16):

> May 24 Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $524.80 together with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.

The Government filed its notice of appeal on July 1, 1955. (Appendix A, *infra*, p. 22.) The Court of Appeals, upon adjudication by the full court, dis-

missed the Government's appeal as not timely filed. (Appendix A, *infra*, pp. 20–29.)

REASONS FOR GRANTING THE WRIT

The decision below, holding that the memorandum decision of the district judge which granted the taxpayer's motion for summary judgment, rather than the formal judgment which the judge signed at a later date, was the judgment, and that the clerk's notation of the memorandum decision, rather than his notation of the later judgment, was the entry of judgment which determined the period within which notice of appeal could be filed, raises an important procedural question of general applicability concerning the proper construction to be placed upon Rules 58 and 79 (a) of the Federal Rules of Civil Procedure, *supra*, pp. 2–4.

This question, on which the lower courts have expressed conflicting views, raises jurisdictional issues which, we believe, should be settled by this Court in order that litigants may know with certainty when an appeal from a judgment of a district court will be timely. By resolving the present differences between the courts of appeals concerning the proper interpretation to be given the rules, this Court can create certainty in an area where certainty is essential.

1. The decision below is in conflict with *United States* v. *Higginson*, 238 F. 2d 439 (C. A. 1); *Cedar Creek Oil and Gas Co.* v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9); and *Papanikolaou* v. *Atlantic Freighters*, 232 F. 2d 663 (C. A. 4). It is also out of harmony with this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802.

"The problem of what constitutes a final judgment has been treated by most of the circuit courts, but without a great degree of uniformity." *United States* v. *Higginson, supra,* p. 442. This lack of uniformity is exemplified by the application of the rules by the court below in the present case, the conflicting views of the First Circuit in the subsequent decision in the *Higginson* case, *supra,* and by the decision of the court below in the later case of *Matteson* v. *United States,* decided December 31, 1956. (Appendix B, *infra,* pp. 31—36).[1]

In the present case, as we have noted, the district judge's memorandum decision, in which the granting of the taxpayer's motion for summary judgment was announced, was held to be the judgment and the clerk's notation of the decision in the civil docket was held to be the entry of judgment which started the appeal period under Rule 73 (a) (*supra,* p. 3). The subsequent, formal judgment signed by the judge and the entry of that judgment by the clerk were considered "ineffective to delay the judgment or extend the time of appeal." (Appendix A, *infra,* p. 24.) In the *Higginson* case, however, the memorandum opinion of the district judge, which stated that "judgment must be entered for the plaintiffs" (238 F. 2d at 442), was held not to be the judgment, and the notation of that adjudication made by the clerk in the civil docket was held not to be the entry of judgment. Instead, the formal judgment, signed at a later date

[1] Without urging the correctness of, but because of, the decision in *Schaefer*, the Government raised the jurisdictional question before the Second Circuit in *Matteson*.

by the judge, was held to be the judgment and the notation of that judgment by the clerk was held to be the entry of judgment which marked the commencement of the appeal period. The First Circuit, relying on this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802, and on its own prior decision in *In re Forstner Chain Corp.*, 177 F. 2d 572 (C. A. 1), stated (per Hartigan, J., 238 F. 2d at 442):

> * * * it can be gathered from the language of the formal judgment of February 23, 1956, and from the fact of its rendition and entry that neither the district judge nor the clerk regarded the reference in the opinion nor the first entry as a judgment or entry of judgment.

In the present case, the court stated that its conclusion (*i. e.*, that the memorandum decision was the judgment contemplated by the Federal Rules of Civil Procedure) was fortified by Rule 10 (a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York to the effect that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order." (Appendix A, *infra*, pp. 24–25.) In the *Higginson* case, the First Circuit noted that no similar local rule was there involved; it stated, however (238 F. 2d at 443): "To the extent that the language of the *Schaefer* opinion might apply even where no such local rule exists, this decision is not in accord with it."

That the present case was not decided on the basis of the local rule and that there is a direct conflict between these circuits regarding the proper appli-

cation of the Rules is evidenced by the Second Circuit's later decision in *Matteson* v. *United States, supra.* Judge Clark, again speaking for the court, explained that in the present case (Appendix B, *infra*, p. 32) "we viewed the local rule as merely corroborative of the practice actually required by F. R. 58" and stated that "Judge Hartigan's opinion must be taken as disapproving our reasoning." Summarizing the conflicting views of these two circuits, the *Matteson* opinion states (Appendix B, *infra*, p. 33):

> But what points up our difference of view is that we do not think the trial judge's original statement is subject to reassessment and definition on the basis of his having later signed a formal judgment presented to him by counsel, whereas our brothers of the First Circuit conclude that his later action demonstrates that his first action was not intended to be a final adjudication.

Cedar Creek Oil and Gas Co. v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9), is another recent example of disagreement in this area. In that case the trial judge had issued a memorandum opinion, together with findings of fact and conclusions of law which stated that the defendant was entitled to prevail and which concluded by stating that "Judgment is hereby Ordered to be entered accordingly" (238 F. 2d at 299). The clerk's notation recited, among other things, that there had been "[f]iled and entered judgment in favor of defendants * * *." The court of appeals held, however, that the time for appeal started to run later when a formal judgment had been signed and notation thereof had been made by

the clerk. Commenting on the judge's signing of a formal judgment and the clerk's notation of it, the court said: "It should not be presumed or assumed they had an intent to do a useless act. If the first acts are ambiguous, we think the later acts afford circumstantial evidence of the intent in the first acts" (238 F. 2d at 301).

The Fourth Circuit, contrary to the Second Circuit, has also regarded the signing of a formal judgment as being inconsistent with a conclusion that a prior announcement of adjudication was the judgment. In *Papanikolaou* v. *Atlantic Freighters,* 232 F. 2d 663 (C. A. 4), a memorandum opinion signed and filed by the district judge which stated that the suit was dismissed was held not to be the judgment in view of the fact that the district judge had later signed a "final order" decreeing that the suit be dismissed. Pointing to the fact that "the judge deemed it necessary or desirable to file a formal judgment of dismissal" (232 F. 2d at 665), the court concluded that the parties "were justified in regarding this as the final judgment disposing of the case."

While *United States.* v. *Hark,* 320 U. S. 531, was a criminal case, the views of this Court concerning the significance that attaches to the signing of a formal order by the district judge cannot be reconciled with those of the Second Circuit in the present case as well as in *Matteson* v. *United States, supra.* The opinion in *Hark* states (pp. 534–535):

> Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an

> opinion or a docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.

In sum, because, as was noted in the *Higginson* case (238 F. 2d at 442), "the Federal Rules do not spell out the meaning of a 'final judgment'" and the terms used "have to be judicially defined if the rules are to be meaningful," and because of the conflicting decisions of the courts of appeals, an authoritative ruling by this Court is necessary.

2. The decision below is also in direct conflict with *United States* v. *Cooke,* 215 F. 2d 528 (C. A. 9), on the proper interpretation of Rule 79 (a). The entry of judgment, which starts the appeal period under Rule 73 (a) must be a notation in the civil docket, as provided for in Rule 58. Rule 79 (a) requires that the notation show "the substance of each order or judgment of the court * * *."

In *Cooke,* a case involving a suit for refund of taxes and interest, the district judge had filed a decision stating that judgment should enter for the plaintiff "as prayed for in the complaint" and the docket entry read "Filing decision (McLaughlin—

Favor Plaintiff)." The court held that this notation, since it did not state the amounts to be recovered by the plaintiff, did not show the substance of the judgment and, accordingly, was not the entry of judgment which would commence the appeal period. The opinion states (215 F. 2d at 530): "We think that the bare statements of the names of the successful litigants without stating the amounts of their respective recoveries do not constitute a showing of the 'substance' of the judgments."

In the present case, on the contrary, the docket entry, which indicated no more than the granting of the motion for summary judgment and which referred to the opinion on file, was held to show the substance of the judgment. The court below, conceding (Appendix A, *infra*, p. 25) that the docket entry was "not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment * * *," nevertheless concluded (Appendix A, *infra*, p. 25) that "The face of the entry itself would tell them [the litigants] all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details * * *." But in *Cooke*, on the contrary, the court held that the fact that an examination of the pleadings would reveal the amount of the judgment to which the plaintiff was entitled, "does not give the *entries* the *substance* of those amounts." The *Cooke* case states (215 F. 2d at 530):

> If the nature of the judgment entries is to be determined only after an examination of the issues presented by the parties' respective pleadings, there would be no necessity for Rule 79 (a) providing the entry must show the substance of the judgment.

In *United States* v. *Higginson, supra,* while the First Circuit found it unnecessary to reach the question whether the docket entry showed the substance of the judgment, it referred to the *Cooke* decision and concluded that the failure to include in the *Higginson* entry the amount to be recovered by the plaintiff was a "further indication that this notation in the docket was not to be an entry of final judgment." (238 F. 2d at 443). See also *Brown* v. *United States,* 225 F. 2d 861 (C. A. 8).

3. The issues presented by this petition are of obvious importance, affecting as they do all litigants in the federal courts. The importance was recognized by the Court of Appeals for the Second Circuit which adopted the unusual procedure of having the full membership of the court consider this case. The present, conflicting views of the courts of appeals concerning the timeliness of appeals should be resolved so that controversies may be decided on their merits and so that appeals will not be dismissed simply because an appellant is unable to determine from the rules when an appeal is timely. The existing "patchwork" which makes it "difficult to know just when, in appellate eyes, a litigant has a judgment" (*Matteson* v. *United States, supra,* Appendix B, *infra,* p. 34) can be remedied only by definitive

clarification by this Court, to the end that the Federal Rules will perform their function of securing (Rule 1) "the just, speedy, and inexpensive determination of every action."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
JOHN N. STULL,
Acting Assistant Attorney General.
HILBERT P. ZARKY,
KARL SCHMEIDLER,
Attorneys.

FEBRUARY 1957.

APPENDIX A

In the United States District Court for the Eastern District of New York

Civil No. 14715

THE F. & M. SCHAEFER BREWING CO., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

1954	
August 31	Complaint filed. Summons issued.
September 1	Summons returned and filed. Defendant served.
November 1	Answer filed.
December 29	Notice of Motion filed for summary judgment.
1955	
January 12	Abruzzo, *J.* Motion for summary judgment adj. to 2-9-55.
February 9	Rayfiel, *J.* Motion for summary judgment adj. to 2-23-55.
February 23	Rayfiel, *J.* Hearing on motion for summary judgment. Motion argued and submitted. Decision reserved. All papers in by 3-5-55.
April 14	Rayfiel, *J.* Decision rendered on motion for summary judgment. Motion granted. See opinion on file.
May 24	Rayfiel, *J.* Judgment filed and docketed against defendant in the sum of $7189.57 with interest of $542.80 to-

415929—57——3

	gether with costs $37 amounting in all to $7769.37. Bill of Costs attached to judgment.
July 21	Notice of Appeal filed.
August 23	Record on Appeal Certified.
"	Record on Appeal with three copies of Index mailed to Clerk of Court of Appeals.
August 26	Receipt from Court of Appeals filed re Record on Appeal.

[Caption omitted]

MEMORANDUM DECISION

Appearances: White & Case, Esqs., Attorneys for Plaintiff By E. W. Pavenstedt, Esq., for the motion Leonard P. Moore, Esq., U. S. Attorney for Defendant; by Elliot Kahaner, Esq., in opposition

RAYFIEL, *J.*

The plaintiff herein moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The parties agree as to the facts, which are as follows: the plaintiff, a New York corporation, had an authorized capital of 200,000 shares of $12 non-cumulative second preferred stock, without par value, having a stated value of $36.25 per share, and 6500 shares of common stock, the par value of which was $100 per share. Prior to March 21, 1951, there were issued and outstanding, 100,000 shares of the $12 non-cumulative second preferred stock and 1,000 shares of the common stock. 100,000 shares of the said preferred stock and 1,000 shares of the common stock were held as Treasury stock, and 4,500 shares of the common stock were still unissued. The plaintiff's capital was $3,725,000.

On March 21 1951, pursuant to appropriate action of its Board of Directors, the plaintiff increased the amount of its capital from $3,725,000 to $10,100,000. This was done by transferring the sum of $6,375,000 from its earned surplus account to its capital account. This bookkeeping entry increased the capital represented by each of the issued and outstanding 100,000 shares of no par value second preferred stock from $36.25 to $100 per share. No additional shares were issued. At the same time the 100,000 shares of the preferred stock and the 1000 shares of common stock held by the corporation as Treasury stock were retired and cancelled.

The plaintiff did not affix any Federal documentary stamps to its stock books or other records. Subsequently, and after an examination of the corporation's books and records by agents of the Internal Revenue Service, a tax of $7012.50, together with interest in the amount of $177.07, was assessed against the corporation, pursuant to section 1802 (a) of the Internal Revenue Code of 1939. The corporation paid the assessment, together with interest, and now sues to recover it on the ground that it was erroneously and illegally assessed and collected.

The facts in the case at bar are almost identical with those in the case of *U. S.* v. *National Sugar Refining Co.* 113 Fed. Supp. 157, decided by Judge Leibell on April 30, 1953. He held that, "Section 1802 (a) is a tax on an original issue of capital stock. *It is not a tax on an addition to capital, made by a transfer from surplus to capital, where no new stock is issued.* The cases show that the stamp tax is, as L. Hand, *C. J.*, put it, 'an excise upon the act of issuance', to be imposed only once when the original certificate is issued. *Empire Trust Co.* v. *Hoey*, 2 Cir., 103 F. 2d 430 at page 432." [Emphasis added.]

After an analysis of the pertinent regulations of the Internal Revenue Bureau (113.20, T. 26, Parts 80 to 169, C. F. R. 1949 edition) Judge Leibell stated, at page 161, "The constant repetition of the words 'issue' and 'issued' in these Regulations emphasizes the point that it is when shares or certificates are issued that the stamp tax impinges on the transaction. An increase in the capital of a corporation by the transfer of part of its earned surplus to the capital account for its outstanding shares of no par value stock does not require the corporation to pay a stamp tax under section 1802 (a), if no shares or certificates are issued as part of the transaction. But if shares or certificates are subsequently issued against the increase in capital thus created, a stamp tax under section 1802 (a) would, I believe, become payable. *Unless there are both the addition to capital and the issuance of new shares or certificates under the recapitalization, no stamp tax is payable under section 1802 (a) as amended August 8, 1947.*

If the Congress had intended that a tax should be imposed on an increase of capital resulting from a transfer of earned surplus to capital it would have said so. If this fact situation constitutes an unforeseen 'loophole' in the tax structure, in particular section 1802 (2) of the Internal Revenue Act, the Congress can take care of that also." [Emphasis added.]

I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted.

Dated: April 14 1955.

LEO F. RAFIEL,
United States District Judge.

[Caption omitted]

JUDGMENT

The plaintiff having moved for summary judgment under Rule 56 R. C. P. and said motion having come on to be heard on February 23, 1955, and the parties having appeared and having presented their papers and arguments and after due consideration the plaintiff's motion for summary judgment having been granted on April 14, 1955, and the Court's opinion having been duly filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, The F. & M. Schaefer Brewing Co., recover of the defendant, United States of America, the sum of $7,189.57 and interest thereon from February 19, 1954 in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37, and that plaintiff have judgment against defendant therefor.

APPROVED

Dated: Brooklyn, New York, May 24th, 1955.

LEO F. RAYFIEL,
U. S. D. J.

Judgment Rendered:
Dated: May 24th, 1955.

PERCY G. B. GILKES, *Clerk.*
By: SIDNEY R. FEUER, *Deputy Clerk.*

In the United States Court of Appeals For th
Second Circuit.

No. 152—October Term, 1955
(Argued January 20, 1956—Decided September 1
1956)

Docket No. 23775

The F. & M. Schaefer Brewing Co.,
PLAINTIFF-APPELLEE

v.

United States of America, DEFENDANT-APPELLANT

Before Clark, *Chief Judge*, and Frank, Medin
Hincks, Lumbard, and Waterman, *Circuit Judges*.

Appeal from the United States District Court fo
the Eastern District of New York, Leo F. Rayfie
Judge.

The United States of America appeals from a sum
mary judgment, D. C. E. D. N. Y., 130 F. Supp. 32
for the refund of stamp taxes paid it by The F. & M
Schaefer Brewing Co., and the latter moves to dismis
the appeal as not timely brought. Motion granted
appeal dismissed.

Thomas C. Burke, New York City (White
Case, Walter S. Orr, and Edmund W. Pa
enstedt, New York City, on the brief), *fo
plaintiff-appellee*.

Karl Schmeidler, Atty., Dept. of Justic
Washington, D. C. (H. Brian Holland, Ass
Atty. Gen., and Ellis N. Slack, Atty., Dep
of Justice, Washington, D. C., and Leonar
P. Moore, U. S. Atty., and Elliott Kahane
Asst. U. S. Atty., E. D. N. Y., Brooklyn
N. Y., on the brief), *for defendant-appellan*

CLARK, *Chief Judge:*

The plaintiff sued to recover the amount of stamp taxes which it alleged the government had illegally assessed and collected from it. The transaction which the government claimed to be thus subject to the tax in question did not involve the issue of any new stock certificates, but was actually an increase in the corporation's capital account by the transfer of $6,375,000 from its earned surplus account to its capital account, thus increasing the capital from $3,725,000 to $10,100,000, and the value of certain issued no-par-value stock from $26.25 to $100 per share. In a reasoned opinion, D. C. E. D. N. Y., 130 F. Supp. 322, Judge Rayfiel granted the plaintiff's motion for summary judgment for the refund, quoting and relying upon the detailed exposition in *United States* v. *National Sugar Refining Co.*, D. C. S. D. N. Y., 113 F. Supp. 157. Where Judge Leibell held that stamp taxes are required only on the issuance of capital stock, and not on a bookmaking transfer assigning greater capital assets to already issued stock. But we do not reach the merits, since we dispose of the appeal on a motion made by appellee to dismiss it on the ground that it was not timely taken. Originally the issues were argued before a panel of this court consisting of Judges Medina, Hincks, and Waterman; but since the motion presented an important question of practice and procedure going beyond the fortunes of this particular case, we determined that adjudication should be made by the full personnel of active circuit judges.

The facts on which disposition of this issue turns are as follows: By its complaint filed August 31, 1954, the plaintiff-appellee alleged payment on February 19, 1954, of documentary stamp taxes in the amount of $7,189.57 and demanded "judgment against defendant in the sum of $7,189.57, interest and costs."

The alleged payment was admitted in the defendant's answer. On December 29, 1954, the plaintiff moved for summary judgment upon three affidavits showing in detail the tax payment of $7,189.57, and the grounds upon which it had been compelled, and also that no refund or credit had been made thereon. On April 14, 1955, Judge Rayfiel signed the memorandum decision directed to said motion, which is reported in 130 F. Supp. 322–324 and which concludes: "I am in agreement with Judge Leibell's analysis and, accordingly, the plaintiff's motion is granted." Thereupon the clerk made a docket entry as follows: "April 14 Rayfiel, J. Decision rendered on motion for summary judgment. Motion granted. See opinion on file." On May 24, 1955, the judge signed a formal "Judgment," as submitted by the plaintiff, for the recovery from the defendant of "the sum of $7,189.57 and interest thereon from February 19, 1954, in the amount of $542.80, together with costs as taxed by the Clerk of the Court in the sum of $37, aggregating the sum of $7,769.37." This document was stamped: "Judgment Rendered: Dated: May 24th, 1955. Percy G. B. Gilkes, Clerk." Thereupon an entry was made in the clerk's docket as follows: "May 24 Rayfiel, J. Judgment filed and docketed against defendant in the sum of $7,189.57 with interest of $542.80 together with costs $37 amounting in all to $7,769.37. Bill of Costs attached to judgment."

The defendant filed its notice of appeal on July 21, 1955, or 96 days from the original grant of summary judgment and 58 days from the filing of the formalized judgment signed by the judge. Under F. R. C. P., rule 73 (a) the United States has 60 days from "the entry of the judgment appealed from" in which to appeal, with a possible additional 30 days where granted by the district court upon a showing of

excusable neglect in failing to learn of the entry. In our view the entry of judgment was on April 14, and the appeal is too late.

The governing principle is found in F. R. 58, which states as to non-jury cases: "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs." In addition, F. R. 79 (a) requires the clerk to keep a book known as a "civil docket," in which each civil action shall be entered with its file number and where "All papers filed with the clerk * * *, all appearances, orders, verdicts, and judgments shall be noted chronologically" on the folio assigned to the action. The rule continues: "These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made." The rules also make provision for formal judgments, F. R. 79 (b), their form, F. R. 54 (a),[1] and suitable indices thereto by the clerk, F. R. 79 (c).

As we have held, these rules contemplate some decisive and complete act of adjudication by the dis-

[1] Compare forms of judgments, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Forms 30 and 31, pp. 68–70.

trict judge; when this is done, and notation thereof made in the civil docket, the judgment is complete without other formal documents which, if filed, are ineffective to delay the judgment or extend the time of appeal. See, e. g., *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, the notation of a grant of summary judgment, as here; and see also *Leonard* v. *Prince Line*, 2 Cir., 157 F. 2d 987, 989; *Murphy* v. *Lehigh Valley R. Co.*, 2 Cir., 158 F. 2d 481, 485; *Binder* v. *Commercial Travelers Mut. Acc. Ass'n of America*, 2 Cir., 165 F. 2d 896, 901; *Markert* v. *Swift & Co.*, 2 Cir., 173 F. 2d 517, 519, n. 1; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, 2 Cir., 223 F. 2d 28; *In re Nuese's Estate*, 15 N. J. 149, 152, 104 A. 2d 281, 282. The history of F. R. 58 and its amendments, designed to strengthen it, as stated in the footnote,[2] demonstrate that this was the intent of the rule. Its purpose is also advanced—as we pointed out in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 469—by Rule 10 (a) of the Southern and Eastern

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[2] In the successive Notes to F. R. 58 appearing in the Preliminary Draft, May 1944, the Second Preliminary Draft, May 1945, and the Report of Proposed Amendments, June 1946, at page 76, there is a statement of the reasons for the changes made—including the express mandate that the "entry of the judgment shall not be delayed for the taxing of costs"—to obviate the following of local practice to the contrary in, notably, the Southern and Eastern Districts of New York. Citations are given to cases showing the federal law of long standing in general accord with the intent of the rule, with particular citation of *The Washington*, 2 Cir., 16 F. 2d 206, that failure of the clerk to enter judgment as thus required is a "misprision" "not to be excused." See also Report of Proposed Amendments, October 1955, F. R. 58, stating a further formula for the judge's direction of entry; and the forms of judgment, Forms 30 and 31, *supra* note 1, with accompanying notes separately citing and relying on *United States* v. *Wissahickon Tool Works*, 2 Cir., 200 F. 2d 936, and companion authorities cited *supra*.

Districts of New York, stating that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order."[3] Hence here everything necessary to start the appeal time running occurred on April 14.

Appellant objects that the docket entry of April 14 does not show the "substance" of the decision. Quite obviously it is not self-contained in the sense that a casual and uninformed reader would know what adjudication had been made, or anything more than that a decision had been rendered granting the motion for summary judgment noted in earlier docket entries and that an opinion was available for the reading. But just as obviously, it was quite informative to the people really involved, the litigants, their counsel, and, indeed, the clerk. The face of the entry itself would tell them all they needed to know at once of the fate of the case and the necessity of appeal, while the material referred to in the entry would afford the precise details when needed by the clerk to prepare a formalized judgment file, or by the parties to arrange to collect or pay the judgment. As a form of communication, therefore, the notation is wholly adequate to inform those for whom it was intended. It serves its real and obvious purpose of showing to these interested persons that the judge had arrived at a decision; for it is this reflection of the judge's state of mind which is decisive. Of course it lies in the judge's power to postpone finality whether because

[3] The complete rule reads as follows:

"Rule 10—Orders

"(a) A memorandum of the determination of a motion, signed by the judge, shall constitute the order; but nothing herein contained shall prevent the court from making an order, either originally or on an application for resettlement, in more extended form."

he has not yet reached the point of judgment or whether because he wants to take time—with the help of counsel or without—to embody the result in his own prepared judgment. But when he shows adjudication, F. R. 58 provides for its simple and quick signification without delay for the elaboration so often cherished by winning counsel. See *United States* v. *Roth, supra,* 2 Cir., 208 F. 2d 467, 470.

Thus to look for the expression of judicial intent affords a reasonably clear touchstone as to the meaning and validity of docket notations of judgments. Of course this principle may not settle every case if trial judges are not careful to make a clear disclosure of intent, as they certainly should be urged to do. But judicial uncertainty may well postpone judgment, while satisfaction of some mere formality should not. Hence it seems undesirable, as well as impracticable, to require more by way of specification of detail for the docket notation. As we have seen, the rules make a clear distinction between the judgment itself and the brief notation thereof in the docket. It surely is impracticable to require a full statement of every judgment, including, for example, the long detail of an injunction; that would destroy any utility of the docket as a quick and ready reference to show the activities had in a case, and would make it not a series of "brief" notations, but a duplication of the judgment book. And it would end any endeavor to speed final adjudication, but would force that to await the submission and acceptance of formally prepared judgments. On the other hand, any attempt to require less, but still some, detail beyond this manifestation of judicial intent would mean chaos and confusion as the poor clerks attempted to determine how much less would be enough. There could easily be more litigation over this side issue than over the

adjudication itself. Consider questions which might arise as to the omission of references to interest and costs.[4] The rule as drafted provides a workable means of handling a matter otherwise not without practical difficulties; it also serves the function of avoiding such purely useless delays—reflecting upon the courts in these days of popular public interest in more speedy justice—as that of almost a year in *United States* v. *Wissahickon Tool Works, supra,* 2 Cir., 200 F. 2d 936, taken merely to cast the judgment made into more formal language.[5] It should not be rendered quite useless (so much so that practicalities would then suggest its repeal for the local state rule of no judgment until settled with counsel) by the interpretation urged. And the precedents are to the contrary. See *United States* v. *Wissahickon Tool Works* and companion cases cited *supra;*[6] also Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, Rule 58, pp. 59, 60, Forms 30, 31, pp. 68–70 and

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[4] Presumably any self-contained notation would need the inclusion of these important items, as in the last docket entry herein quoted above; but interest on a money judgment is mandatory, 28 U. S. C. § 1961, *cf.* the forms cited *supra* note 1, and a judgment is not to be delayed for the taxation of costs, see *supra* note 2. This would mean that the clerk must be more precise than the judge in deciding, i. e., that the clerk must presume to go beyond the judge's holding in making up the notation. But see the cases cited *infra* note 7.

[5] Even longer delays have been observed, as where a worthless shell of a patent declared invalid has continued in nominal existance for two years pending a formal entry of judgment. So there was no practical reason for the 40 days' delay of the present case, invited by the plaintiff in submitting a superfluous form of judgment.

[6] Other cases have been so dismissed on the call of our motion calendar, save in a few instances where a 30-day additional period may be made available to an appellant under F. R. 73 (a) and as noted in *United States* v. *Roth*, 2 Cir., 208 F. 2d 467, 471, at n. 1.

notes thereto; and 6 Moore's Federal Practice ¶ 58.03[1], note 5 (2d Ed. 1953), specifically approving as a docket notation, "Judgment for plaintiff enjoining the defendant pursuant to the prayer of the complaint entered."[7]

[7] Citing *Steccone* v. *Morse-Starrett Products Co.*, 9 Cir. 191 F. 2d 197, and *Willoughby* v. *Sinclair Oil & Gas Co.*, 10 Cir., 188 F. 2d 902, where notations of injunction judgments were quite abbreviated; and see also *In re Forstner Chain Corp.*, 1 Cir., 177 F. 2d 572, and *Porter* v. *Borden's Dairy Delivery Co.*, 9 Cir., 156 F. 2d 798, 799, as to judgments for defendants. In *United States* v. *Cooke*, 9 Cir., 215 F. 2d 528, 530, relied on by appellant, the judge's direction that judgment should enter "as prayed for in the complaint" was held sufficient, but the notation in the docket, "Filing decision (McLaughlin—Favor Plaintiff)" was held insufficient, as not telling what was granted, and the difference between that and the notation in the *Wissahickon* case was pointed out. Similarly in *Kam Koon Wan* v. *E. E. Black, Limited*, 9 Cir., 182 F. 2d 146, the notation was only for a partial judgment which could not even be final.

In general, since our own rulings have been so definitive, decisions from other circuits are not necessarily helpful, particularly because the language of a trial judge often needs to be interpreted against a local background, just as here we need to have in mind our local practice, including Rule 10 of the court below quoted in note 3 *supra*. But as we have just indicated, we have found no decision contrary as to the form and intent of the docket notation. With reference to the other point, namely, the effect of a judge's memorandum and direction when docketed as a judgment, there has been some division, three circuits—the First and Ninth and our own—supporting the view herein stated, while two others seem in varying degrees and not overclearly contrary. See *In re Forstner Chain Corp.*, *supra*, 1 Cir., 177 F. 2d 572; *Napier* v. *Delaware, Lackawanna & Western R. Co.*, *supra*, 2 Cir., 223 F. 2d 28; *Anderson* v. *Continental Steamship Co.*, 2 Cir., 218 F. 2d 84, 86; *Steccone* v. *Morse-Starrett Products Co.*, *supra*, 9 Cir., 191 F. 2d 197; but *cf. Healy* v. *Pennsylvania R. Co.*, 3 Cir., 181 F. 2d 934; *Brown* v. *United States*, 8 Cir., 225 F. 2d 861. See Commentary, *Entry of Judgment*, 18 Fed. Rules Serv. 927; and see also Report of Proposed Amendments, October 1955, p. 60, *supra* note 1, accepting the majority view as "declaratory of existing law" and recommending an amendment to carry it more clearly into effect:

We conclude, therefore, that the practice heretofore sanctioned by us represents a correct interpretation of the governing rules, as well as a wise and practicable principle materially aiding in the expeditious determination of civil cases. Accordingly the appeal must be dismissed as not timely filed.

Motion to dismiss granted; appeal dismissed.

In the United States Court of Appeals for the Second Circuit

THE F. & M. SCHAEFER BREWING CO.,
PLAINTIFF-APPELLEE,

v.

UNITED STATES, DEFENDANT-APPELLANT

JUDGMENT

NOTE.—[Stamped:] United States Court of Appeals, Second Circuit. Filed September 12, 1956. A. DANIEL FUSARO, *Clerk*.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of September, one thousand nine hundred and fifty-six.

Present: Hon. CHARLES E. CLARK, *Chief Judge;* and Hon. JEROME N. FRANK, Hon. HAROLD R. MEDINA, Hon. CARROLL C. HINCKS, Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN, *Circuit Judges*

THE F. AND M. SCHAEFER BREWING CO., PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is dismissed.

A true copy.

A. DANIEL FUSARO, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Second Circuit

No. 112—October Term, 1956

(Argued December 7, 1956—Decided December 31, 1956)

Docket No. 24214

GRACE M. MATTESON, AS SURVIVING EXECUTRIX OF THE LAST WILL AND TESTAMENT OF EDWARD M. MARKHAM, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before CLARK, *Chief Judge*, and FRANK and LUMBARD, *Circuit Judges*

Appeal from the United States District Court for the Northern District of New York, JAMES T. FOLEY, *Judge*

The defendant moves to dismiss, as not timely filed, an appeal by the plaintiff-executrix from the dismissal of her action for the refund of estate taxes. Appeal dismissed.

WILFORD A. LE FORESTIER, Troy, N. Y. (Draper & Bartle, Troy, N. Y., on the brief), *for plaintiff-appellant.*

CHARLES B. E. FREEMAN, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., and Lee A. Jackson and Harry Baum, Atty's., Dept. of Justice, Washington,

D. C., and Theodore F. Bowes, U. S. Atty., N. D. N. Y., Syracuse, N. Y., on the brief), *for defendant-appellee.*

CLARK, *Chief Judge:*

Defendant asks us to dismiss as untimely this appeal taken by the plaintiff from the dismissal of her complaint in an action for the refund of estate taxes. Plaintiff's notice of appeal was filed 113 days after the judge had filed a memorandum-decision dismissing the complaint, and 56 days after the entry of a formal judgment to like effect signed by him at defendant's request. Under F. R. C. P., rule 73 (a), her appeal must be taken within 60 days from judgment. In accordance with our decisions, reanalyzed and reappraised by the full court in *The F. & M. Schaefer Brewing Co.* v. *United States,* 2 Cir., 236 F. 2d 889, the appeal is untimely and must be dismissed. We find no support in the record for plaintiff's contention that Judge Foley's failure to append his signature to the memorandum-decision showed his intent to delay judgment; we have no basis for judicial notice of so odd a method of signifying intent and in any event do not feel that the clear provisions of F. R. 58 can be limited or varied by such subjective reactions of the trier.

We would stop here but that a distinguished Court of Appeals has now viewed our *Schaefer* holding as dependent on a local district court rule and has rendered a decision which it states not to be in accord with the language of our opinion to the extent that the latter may apply even where no such local rule exists. *United States* v. *Higginson,* 1 Cir., Nov. 16, 1956. Since we viewed the local rule as merely corroborative of the practice actually required by F. R. 58, Judge Hartigan's opinion must be taken as disapproving our reasoning. True, there is room for

distinction on the facts so far as disclosed; unlike our present case, which is an outright dismissal of the complaint, the lower court adjudication there was for recovery of a very substantial sum of money with interest which (so far as the slip opinion shows) was not shown in the judge's first direction. Moreover, as we have pointed out, the issue always turns on the trial judge's declared intent as to the judgment; and where he has not made that clear, some interpretation is necessary.[1] But what points up our difference of view is that we do not think the trial judge's original statement is subject to reassessment and definition on the basis of his having later signed a formal judgment presented to him by counsel, whereas our brothers of the First Circuit conclude that his later action demonstrates that his first action was not intended to be a final adjudication. We think that this formulation of the governing rule will have untoward results in practice which have apparently not been contemplated so far as appears from the rather summary discussion in *United States* v. *Higginson*, *supra*.

We suggest that if a district judge makes a practice of signing formal judgments later presented to him by counsel, there will necessarily result a nullification of the mandate of F. R. 58 that when "the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction." Nor can we seriously doubt that this is contrary to

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[1] There seems no basis for doubt here. At the end of Judge Foley's four-page reasoned "Memorandum-Decision" he says: "As my findings of fact, I adopt the agreed facts stipulated. My conclusion is that the plaintiff is not entitled to recover; the complaint is dismissed and a judgment to such effect may enter for the defendant." And the docket entry as of the date filed was: "Filed Memorandum-Decision—Judge Foley—dismissing complaint and judgment to such effect may enter for the defendant."

the intent of the rule; for the Advisory Committee has been articulate in showing that in its recommendations to the Supreme Court it has continuously pressed for rules requiring prompt entry of judgments without delay which is occasioned by awaiting the action of counsel. This is made clear in the Committee Notes cited and discussed in some detail in the *Schaefer* opinion. It seems probable that most trial judges respect the spirit of the rules and attempt to make their directions clear and free of ambiguity; but both experience and the reported cases show that a certain number (increasingly fewer, we venture to believe) do not. We state this without attempting to assess blame upon either the counsel who presents or the judge who signs the later form from which all the confusion arises; the strong state practice to the contrary, the tendency of many attorneys to overlook or neglect details of federal practice, the natural willingness of judges pressed ex parte "to expedite the appeal"—all tend that way; and the only remedy seems to be increased knowledge of a different federal practice consistently applied. But if a trial judge, whether through misunderstanding or carelessness, can pervert the rule's intent in a decision sure to be more extensively reported and publicized than the mere complying rulings, the resulting patchwork will make it difficult to know just when, in appellate eyes, a litigant has a judgment.

We regret that our brothers have not given us the benefit of their views on these practical aspects of the problem, particularly as we had read their earlier cases as in accord with our views. In addition to this problem we have just stated of varying applications of what seem to us rather clear directions from the rule makers, we suggest two considerations of the utmost practical importance. One is that in

these days of unusual public interest in and criticism of the law's delays we can think of nothing more deserving of criticism than so bootless a delay as that of the two months here involved (or the substantially longer periods perhaps even more usual) while winning counsel are formally verbalizing a result already reached and announced. And the other is that in practice the delaying rule results in the court yielding to counsel its own culminating responsibility for the fashioning of the ultimate judgment and accepting the normal excess of detail supplied by zealous advocates in their natural desire to press home all conceivable ad hoc advantages from the judgment. The only reason we have noted in support of such a rule (beyond counsel's impermissible desire to control the judgment) is that it may follow a perhaps more familiar state practice and thus avoid loss of appellate rights through inadvertence. But even if it be assumed that appellate rules should be adjusted to accommodate carelessness, at cost of the serious losses in effective court procedure noted above, the result thus desired will not be achieved except spasmodically and hence in a discriminatory fashion. For the local procedures in various areas of even a single circuit are too great to permit of devising a rule familiar to all, and thus desirable federal expedition and uniformity may be easily sacrificed without real gain. We still feel, therefore, that the rule planned by the Advisory Committee and adopted by the Supreme Court states the orderly course which we should require. The "just, speedy, and inexpensive determination of every action," F. R. 1, is not to be achieved if courts abdicate to counsel the responsibility for advancing the action to its ultimate conclusion.

To make not wholly fruitless the earnest presentation on the merits by counsel, perhaps somewhat decoyed by defendant's submission of the formal judgment, we say that examination of Judge Foley's careful analysis of the law and relevant decisions, state and federal, discloses no sound basis for upsetting his conclusions. Plaintiff's claim seems doomed to fail in any event.

Appeal dismissed.

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